

108 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Virginia Electric and Power Company
UAE Mecklenburg Cogeneration LP
Mecklenburg Cogenco, Inc.
Cogeneration Capital Corp.
United American Energy Holdings Corp.
United American Energy Corp.

Docket No. EC04-104-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued August 4, 2004)

1. On May 6, 2004, Virginia Electric and Power Company (Dominion Virginia Power), UAE Mecklenburg Cogeneration LP (UAE Mecklenburg), Mecklenburg Cogenco, Inc. (Cogenco), Cogeneration Capital Corp. (Capital), United American Energy Holdings Corp. (UAE Holdings) and United American Energy Corp. (UAE Corp.) (collectively, Applicants) filed a joint application pursuant to section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization for: (1) the proposed disposition of jurisdictional facilities associated with the transfer of 100 percent of the ownership interests in Cogenco and Capital from UAE Corp. to Dominion Virginia Power; and (2) the proposed transfer of UAE Mecklenburg's market-based rate tariff. Applicants also request authorization for certain proposed internal restructurings of UAE Corp. prior to the closing of the proposed acquisition. The Commission has reviewed the transaction under the Commission's Merger Policy Statement² and will authorize the disposition as consistent with the public interest.

¹ 16 U.S.C. § 824b (2000).

² Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also* Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

I. Background**A. Description of the Parties**

2. Dominion Virginia Power is a public utility subsidiary of Dominion Resources, Inc. (DRI)³ that is engaged in the generation, transmission, distribution and sales of electric energy. It owns nuclear, fossil fuel and hydroelectric generating units with a capacity of 14,840 megawatts (MW) in Virginia, North Carolina and West Virginia. Dominion Virginia Power sells electric energy at wholesale and at retail in Virginia and North Carolina. Dominion Virginia Power is authorized by the Commission to sell power at market-based rates outside its service territory.

3. UAE Mecklenburg owns a 138 MW topping cycle pulverized coal facility and its appurtenant transmission facilities (the Facility) located in Mecklenburg County, Virginia. UAE Mecklenburg is also authorized by the Commission to sell power at market-based rates.⁴ UAE Corp., a wholly-owned subsidiary of UAE Holdings, owns all of the outstanding ownership interests of Cogenco and Capital, which, in turn, own all of the ownership interests in UAE Mecklenburg.

B. The Transaction

4. The proposed transfer of ownership interests in Cogenco and Capital involves a two-step process. In the first step, UAE Corp. will sell 100 percent of the outstanding ownership interests of Cogenco and Capital to Dominion Virginia Power. As a result of the purchase, Dominion Virginia Power will obtain ownership of the Facility.⁵ In the second step, Cogenco, Capital and UAE Mecklenburg will be merged into Dominion Virginia Power, and the Amended and Restated Long-Term Power Purchase Agreement (PPA), under which Dominion Virginia Power purchases the Facility's current output of 132 MW, will be terminated.

³ DRI is a registered holding company under the Public Utility Holding Company Act of 1935. DRI's principal subsidiaries are Dominion Virginia Power, Consolidated Natural Gas Company (CNG) and Dominion Energy, Inc. (DEI).

⁴ UAE Mecklenburg Cogeneration, L.P. (Docket No. ER02-1902-000 July 8, 2002) (unpublished letter order).

⁵ Pursuant to an internal reorganization that UAE Corp. will complete before the closing of the transaction, Capital and Cogenco will either be converted to LLCs or their ownership interests in UAE Mecklenburg will be transferred to LLCs that are indirect wholly owned subsidiaries of UAE Corp., and Dominion Virginia Power will purchase the resulting LLC interests.

5. In their section 203 Application, Applicants seek Commission authorization to transfer UAE Mecklenburg's market-based rate authority along with UAE Mecklenburg at the time of the acquisition. Applicants also state that UAE Mecklenburg's market-based rate authority will be cancelled after the Acquisition is consummated.⁶

II. Notice and Interventions

6. Notice of the filing was published in the *Federal Register*, 69 Fed. Reg. 27,914 (2004), with interventions or comments due on or before May 27, 2004. Massey Coal Sales Company, Inc. (Massey) filed a timely motion to intervene and a conditional protest. Massey conditionally protests the transaction pending submission of additional information regarding the impact that the proposed acquisition and termination of the PPA may have on the Facility's future supply and cost of fuel. Massey is a party to an Agreement for the Sale and Purchase of Coal (Coal Contract) with Mecklenburg Cogeneration, L.P., under which Massey has the right and obligation to supply the Facility's full coal requirements.

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motion to intervene of Massey serves to make it a party to this proceeding.

B. Section 203 Analysis

8. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest."⁷ The Commission's analysis under section 203(a) of the FPA of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁸ As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest.

⁶ Section 203 Application at 1, 11-12.

⁷ 16 U.S.C. § 824b(a) (2000).

⁸ 18 C.F.R. § 2.26b (2004).

1. Effect on Competition

a. Applicants' Analysis

9. Applicants state that the proposed transfer will have no adverse effect on competition. They state that the UAE Mecklenburg Facility already sells its output to Dominion Virginia Power under the long-term PPA, which gives Dominion Virginia Power exclusive rights to purchase and dispatch, and thus control, the Facility's total output of 132 MW of generating capacity. Applicants assert that the change in status of this capacity from contracted-for capacity to owned capacity will have no effect either on market concentration or on Dominion Virginia Power's market share.⁹

10. Applicants state that after the closing of the acquisition, Dominion Virginia Power may obtain an additional 6 MW of capacity from the Facility. Applicants assert that the smallest relevant geographic market for evaluating the horizontal competitive effect of the proposed transaction is Dominion Virginia Power's control area. Applicants note that in this geographic market, Dominion Virginia Power owns or controls a total of 18,535 MW of generation. The addition of 6 MW represents a .032 percent increase in the capacity controlled by Dominion Virginia Power and a 5 point increase in the Herfindahl-Hirschman Index (HHI). Applicants contend that this increase is clearly *de minimis* and that, therefore, no further horizontal market power analysis should be required.

11. Applicants argue that the proposed transaction also does not raise issues regarding either vertical market power or barriers to entry. They maintain that, because the proposed transaction will not result in a significant increase in the level of market concentration, Dominion Virginia Power and its affiliates will not have any incentive to exert vertical market power in electric or gas markets. Applicants also cite the following factors as evidence that the proposed transaction does not raise vertical market power issues: Dominion Virginia Power and its affiliates do not control any gas transportation facilities in the same geographic market in which the Facility competes; Dominion Virginia Power has an open access transmission tariff; and both Dominion Virginia Power and its parent, DRI, are subject to the Commission's Standards of Conduct for electrical utilities and for interstate gas transmission pipelines.

12. We find that the proposed transaction will not harm competition in any relevant geographic market. Dominion Virginia Power's acquisition of 6 MW would have a *de minimis* effect on market concentration. Therefore, with respect to horizontal market power, we find that the combination of VEPCO's existing generation with the additional

⁹ Applicants state that, in a previous order, the Commission treated the 132 MW of contracted-for capacity as DRI capacity and part of DRI's market share. See *Dominion Resources, Inc. and Consolidated Natural Gas Company*, 80 FERC ¶ 61,162 (1999).

6 MW of capacity will not harm competition. Regarding the transaction's effect on vertical market power, we find that the addition of 6 MWs of capacity will not increase VEPCO's ability or incentive to use control of its transmission facilities or inputs to generation to harm competition in relevant wholesale electricity markets.

2. Effect on Rates

a. Applicants' Analysis

13. According to Applicants, customers take partial requirements wholesale service from Dominion Virginia Power through fixed charge rates and average cost fuel adjustment clauses (FACs).¹⁰ Applicants note that the FACs recover from ratepayers Dominion Virginia Power's contract energy payment, which includes a non-fuel variable operations and maintenance (O&M) component, as part of the energy costs of purchased power. Applicants state that, after Dominion Virginia Power has acquired the Facility, the non-fuel variable O&M component will not be included in the FACs. Dominion Virginia Power will book these costs as a non-fuel expense, resulting in cost savings to wholesale customers.

14. Dominion Virginia Power is not proposing to adjust wholesale customers' fixed charge rates to reflect the proposed acquisition. Therefore, Applicants contend that the proposed transaction will not affect the wholesale fixed charge rates or the rates of Dominion Virginia Power's wholesale transmission customers that are served under Dominion Virginia Power's open access transmission tariff.

15. Applicants state that Dominion Virginia Power is subject to retail rate regulation by the Virginia State Corporation Commission (VSCC) and the North Carolina Utilities Commission (NCUC). The Applicants contend that the FACs are the only means by which the proposed transaction could affect retail ratepayers in Virginia and North Carolina and that the VSCC and the NCUC have the authority to control these effects. Applicants state that the Virginia legislature recently enacted legislation that freezes the FAC clauses of Virginia retail customers through July 1, 2007. Therefore, Virginia retail customers will experience cost savings through their FACs beginning July 1, 2007.

16. Applicants assert that Dominion Virginia Power does not intend to change its fixed retail base rates in Virginia and North Carolina at this time. Therefore, Applicants contend that the transaction does not affect the fixed retail base rates.

¹⁰ Old Dominion Electric Cooperative (ODEC) does not use a FAC. It pays an energy charge for reserve service based on the costs of combustion turbines. According to Applicants, ODEC's energy charge will not be affected by the proposed transaction.

b. Massey's Conditional Protest

17. Massey states that it has the contractual right and obligation through the coal contract to supply the Facility's full coal requirements. Massey contends that the coal supply is essential to the Facility and that the cost of coal determined under the PPA is a major determinant of the price Dominion Virginia Power pays the Facility for electricity under the PPA. Massey also states that the PPA and Coal Contract are interdependent agreements, as they relate to the determination of the price of coal for, and the price of electrical output generated by, the Facility.

18. Massey argues that the proposed termination of the PPA may significantly affect the cost of fuel to the Facility, the price of the electrical output of the Facility, and the financial viability of the Facility, which in turn may affect the jurisdictional rates of the new owner, Dominion Virginia Power. Therefore, Massey asserts that Applicants should explain the effect of the application on the future supply and price of fuel for the Facility.

c. Commission Determination

19. We find that neither wholesale nor retail customers' current rates will increase as a result of the proposed transaction. Dominion Virginia Power sells power at fixed charge rates to its wholesale customers, which will not change, and fixed base rates to retail customers (with the exception of ODEC, which pays an energy charge), which also will not change. Massey's pleading does not convince us otherwise. Therefore, we find the proposed transaction will not adversely affect rates.

20. Massey's concerns regarding the impact that the termination of the PPA may have on the future supply and price of coal implicate contractual issues that are outside of this transaction, and thus do not come within the scope of a section 203 filing. As explained above, we find that the transaction will not increase rates.

3. Effect on Regulation

a. Applicants' Analysis

21. Applicants assert that the proposed transaction will not have an adverse effect on regulation by the Commission. They point out that they have already agreed to abide by the Commission's policies regarding inter-affiliate transactions.

22. With regard to state regulation, Applicants state that Dominion Virginia Power is seeking certain regulatory authorizations from the VSCC because the Facility is located in Virginia. While the NCUC does not have jurisdiction over the Facility, it will have rate setting authority regarding the Facility. Applicants conclude that state regulation will either be enhanced or will not be diminished by virtue of the proposed transaction.

b. Commission Determination

23. We note that no one has raised concerns about the transaction's effect on state or federal regulation. There will be no change in the Commission's jurisdiction over the Facility. No state has indicated that it lacks jurisdiction to consider the transaction's effect on retail rates, nor has any state asked us to do so. Thus, we are satisfied that the proposed transaction will not adversely affect federal or state regulation.

c. Accounting

24. Section 33.5 of the Commission's regulations requires that Applicants present proposed accounting entries with sufficient detail showing the effect of the transaction. Dominion Virginia Power requested a waiver of section 33.5 and did not include the proposed accounting entries and related details in the instant application. Thus, we could not evaluate Dominion Virginia Power's accounting to determine whether it is consistent with the Commission's Uniform System of Accounts.

25. Dominion Virginia Power's request for a waiver of section 33.5 is denied. The information required in section 33.5 enables the Commission to evaluate an Applicant's accounting for the transaction and provide guidance and direction when the accounting is inconsistent with the Commission's Uniform System of Accounts.¹¹ Therefore, to assure proper accounting for the proposed transaction, we will require Dominion Virginia Power to submit its proposed accounting for the transfers within thirty days of the date of this order.

C. Market-Based Rate Authority

26. With respect to Applicants' request to transfer UAE Mecklenburg's market-based rate authority or tariff, Applicants' request in this regard is unclear. Applicants do not articulate how such a transfer will take place given Dominion Virginia Power's existing market-based rate authority, nor do Applicants provide any basis to make such a transfer. Accordingly, Applicants' request in this regard is denied. We note that, to the extent that Applicants wish to cancel their market-based rate authority, they must do so pursuant to a filing under section 205 of the FPA.

The Commission orders:

(A) Applicants' proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order;

¹¹ 18 CFR § 33.5 (2004).

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission;

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted;

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;

(E) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the transaction;

(F) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated;

(G) Applicants shall account for the transfer of facilities in accordance with the instructions to Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts and file, within six months of the date of the transfer, detailed journal entries, with any narrative statements necessary to explain the proposed accounting, including related income tax consequences; and

(H) Dominion Virginia Power shall submit its proposed journal entries and related details required by section 33.5 of the Commission's Regulations within thirty days of the date of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.